NO. 93-

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

RICHARD W. HUBBARD,
Securities Commissioner of the
State of Delaware,
Petitioner,

v.

OLDE DISCOUNT CORPORATION,
Respondent,

BRIEF FOR NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC. AND NATIONAL CONSUMERS LEAGUE AS *AMICI CURIAE* SUPPORTING PETITIONER, RICHARD W. HUBBARD

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Amici Curiae

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MOTION FOR LEAVE TO FILE BRIEF, AMICI CURIAE

The North American Securities Administrators Association, Inc. and the National Consumers League make this motion for leave to file the attached Brief, Amici Curiae, pursuant to Rule 37.2 of this Court. Written permission of the petitioner, Richard W. Hubbard was sought and received. See attached letter. Written permission of the respondent, Olde Discount Corporation, was sought and refused. See attached letter. Therefore,

leave of the Court is sought to file the Amici curiae Brief supporting the Petitioner and in favor of granting the Writ of Certiorari.

INTEREST OF THE AMICI CURIAE

NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.

The North American Securities Administrators Association is an association of state and provincial securities administrators in the United States, including the District of Columbia and Puerto Rico, Canada and Mexico. NASAA serves as the forum where its members work together to protect investors at the grassroots level and to promote fair and open capital markets. NASAA speaks as the collective voice for its members in forwarding those interests.

The interest of NASAA in the present case is two fold. First, the Securities Commissioner of the State of Delaware is a member of NASAA and has asked NASAA to join as an ***amicus curiae***. Second, the decision of this Court will have a direct impact upon most of the

other members of NASAA. Four other member states, Arizona, the District of Columbia, Indiana, and Virginia have statutory authority similar to that granted by Section 7325(b) of the Delaware Securities Act to grant administrative restitution or rescission. Twenty-six other members have statutory provisions specifically allowing the securities agency to seek restitution or rescission in a court action for injunction. Three additional jurisdictions, Arkansas, Michigan, and Tennessee grant their securities agency specific authority to seek disgorgement, a remedy having a similar effect to restitution or rescission. Most of the remaining United States members have adopted Section 408 of the Uniform Securities Act, 1 Blue Sky L. Rep. (CCH) ¶5548 (1957), which allows the agency to seek an injunction and ancillary relief. This Court and the state courts have held that such ancillary relief shall include rescission,

restitution, and disgorgement.[1] State securities regulators of those states maintain an independent interest in, and rely upon, such authority as part of the panoply of remedies available to them.

The members' interest in such authority is firmly based on their statutory mandate to protect the public interest. Although investors in a particular transaction or case are obviously the focal point of their regulatory authority, the "public interest" should not be so narrowly interpreted as to exclude the regulators' efforts to promote investor protection generally as well as fair and open capital markets. In their effort to fulfill their mandate to protect the public interest, NASAA members protect the public-at-large, including investors and others participating in the securities marketplace. If, as a

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[1] See e.g, Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288 (1960); Porter v. Warner Holding Co., 328 U.S. 395 (1946); State ex rel. Day v. Southwest Mineral Energy, Inc., 617 P.2d 1334 (Okla. 1980). See also 12A J. Long, Blue Sky Law §9.05[6] (1992).

result of the regulators' efforts to protect the public interest of investor protection generally, some individual investors are incidentally benefitted personally from that action, the Court should not interpret such regulatory authority as being captive to those individual investors. In order to fulfill their mandate, state and federal regulatory agencies of all types must be provided with the appropriate regulatory tools. If the opinions below are affirmed, a principal regulatory tool currently used by securities agencies as well as a substantial number of other regulatory agencies to deter violations will no longer be available. By narrowing the available range of sanctions, the courts below will have forced regulators to abandon a balanced approach to determining an appropriate deterrent in a particular case. Instead, lacking flexibility, they will be forced to impose more draconian penalties having much broader consequences for those regulated. For example, a securities agency, not able to seek

restitution or rescission, may be left with little choice but to revoke or suspend the license of a major broker dealer in response to a violation by one of its branch offices or registered representatives. Without the power of rescission or restitution, the remaining alternative sanctions available to the agency, other than suspension or revocation, may be deemed ineffective to deter future offenses. Such revocation or suspension sanction often is not as an appropriate sanction as restitution or rescission because it may have broad negative consequences for other investors and employees associated with that broker dealer in the state and beyond.[2]

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[2] Under Section 204(a)(2)(E) of the Uniform Securities Act, 1 Blue Sky L. Rep. (CCH) §5524 (1956), suspension or revocation of a broker-dealer or agent's registration by one state is grounds for revocation or suspension of the broker-dealer or agent's license in all other states where it or he is registered.

NATIONAL CONSUMERS LEAGUE

The National Consumers League (the "NCL") is a national membership-based consumer advocacy organization, founded in 1899, committed to a broad-based effort to protect individuals in the marketplace, employment sector, and health care fields. The National Consumers League is also active in consumer protection areas such as investment and securities fraud abatement. The National Consumers League created both the Alliance Against Fraud in Telemarketing and the National Fraud Information Center to work with consumers on educational and advocacy projects designed to warn the public about fraudulent and deceptive securities agencies which regulate investment offerings to their citizens and are a major force in protecting citizens against fraudulent and deceptive activities.

NCL believes that state regulation is the most efficient and effective way for a citizen to maintain access to information and seek protection in securities and investment deal-

ings. NCL has an interest in the present case because it recognizes that state securities regulators must have effective regulatory tools to promote effective regulation.

SUMMARY OF ARGUMENT

Rule 10 outlines those reasons to be considered by the Court when deciding whether exercise its discretion and grant certiorari. NASAA and the NCL believe that the present case meet most of those enumerated criteria.

Most importantly, this case presents a situation where the Third Circuit has decided an important question of federal law which "has not been, but should be, settled by, this Court." Rule 10.1(c). This is not a typical case where two private litigants are seeking the solution to a private dispute. This case involves an issue which strikes at the very foundations of our nation--the division of political power between the federal government and the states. The trial court has enjoined a state official from performing his duty under a state law, adopted under the police

power of the State, which he is sworn to enforce. The Third Circuit has upheld such injunction on the basis of the Supremacy Clause and the claimed preemption of the state law by the Federal Arbitration Act. Traditionally, this Court has held that in the case of the preemption of a state law that the delicate balance between the sovereign rights of the state and the supremacy of the Federal government entitles the state to have the preemption issued reviewed and decided by this Court as the highest Federal court.

Further, if allowed to stand, the decision of the Third Circuit will have far a reaching impact upon the securities, consumer protection, and other regulatory statutes of many states. A wide variety of public welfare and regulatory statutes in most of the states provide that either the regulating agency or the courts may grant rescission, restitution or disgorgement as part of a state enforcement action. The ability of these agencies to continue to seek these traditional remedies in

those cases involving investors with arbitration clauses would be in serious question under the ruling of the Third Circuit in the present case.

The impact of this decision is not limited to state enforcement efforts. It may heavily impact the enforcement activities of federal regulatory agencies and self-regulatory organizations such as the Securities and Exchange Commission, the Federal Trade Commission, the Commodity Futures Trading Commission, the National Association of Securities Dealers, and the major stock exchanges. A self-regulatory organization, such as the NASD, may be put in the awkward situation of being able to award rescission in their arbitration cases, but not in their disciplinary hearings. All these agencies routinely seek rescission, restitution, or disgorgement in their administrative and court enforcement actions. Again, the ability to continue their practices is placed in serious jeopardy by the decision of the Third Circuit.

Finally, the decision below could have a substantial impact upon the ability of the state courts to award restitution as part of a criminal sentence. Such awards are becoming increasingly popular as an alternative to incarceration for white collar offenses.

Second, NASAA and the NCL submit that the conclusion of the Third Circuit concerning the preemption of the Delaware Securities Act by the Federal Arbitration Act runs contrary to prior holdings of this Court. Rule 10.1(c).

In ***Gilmer v. Interstate/Johnson Lane Corp.***, ___U.S.___, 111 S. Ct. 1647 (1991), this Court held that claims under the Age Discrimination and Employment Act ("ADEA") could be made subject to a compulsory arbitration clause. As in the case of the securities acts, ADEA provides for enforcement through both private suit and public enforcement actions by the Equal Employment Opportunity Commission ("EEOC"). The Court specifically concluded that a private arbitra-

tion clause would not prevent the EEOC, or the courts at its request, from granting relief.

Further, in ***Schneiderwind v. ANR Pipeline Co.***, 485 U.S. 293, 299 (1988), this Court held that preemption is a matter of congressional intent. Subsequently, in ***Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University***, 489 U.S. 468, 477 (1989), the Court held that there was no specific preemption provision in the Federal Arbitration Act nor was there any congressional intent to fully occupy the arbitration field. Finally, in ***California v. ARC America Corp.***, 490 U.S. 93, 101 (1989), the Court indicated that a state act enacted under the historic police powers of the States will not be preempted by a Federal Act unless that is a clear and manifest intent by Congress to do so.

The Third Circuit decision in the present case to preempt the Delaware Securities Act clearly runs contrary to these principles.

Third, the fragmented nature of the decision below suggests that this Court should exercise its power of supervision over the lower federal courts. Rule 10.1(a). As noted above, this case involves a far reaching issue of national importance involving states rights. Yet, a divided Third Circuit did nothing more than affirm the decision of the trial court. One judge dissented, voting to reverse the trial court and find no pre-emption. The two judges constituting the majority could not agree upon the appropriate rationale for their conclusion. One judge based his affirmance on preemption, the other on a contract theory. As a result, there is no majority decision as to why the Delaware provision should be preempted. Thus, while the case stands as precedent that state securities administrators may not seek re-stitution in administrative actions, Delaware and the other states are not provided with a satisfactory rationale for such conclusion. This Court should exercise its supervisory

authority to correct such an unsatisfactory state of the law.

ARGUMENT

I. THE PRESENT CASE INVOLVES A MAJOR PUBLIC POLICY ISSUE AFFECTING NOT ONLY DELAWARE, BUT ALSO THE ENFORCEMENT AND CRIMINAL JUSTICE PROGRAMS OF MANY OTHER STATES AND FEDERAL AGENCIES.

NASAA and the NCL believe that the Third Circuit made a grievous error in affirming the grant of a preliminary injunction against the Delaware Securities Commissioner. This injunction prohibited the Commissioner from exercising the power granted to him under Section 7325(b) of the Delaware Securities Act, 6 Del C. § 7325(b), to issue an order of rescission against Olde Discount Corporation and in favor of the Engelhardt's as a penalty for violation of Section 7316 of the Delaware Securities Act, 6 Delaware C. §7316. It is likely that, if allowed to stand, that the decision below will be interpreted in subsequent decisions to prohibit the Securities Commissioner from issuing orders of restitution and disgorgement as well.

The decision of the Third Circuit and its logical extensions will have a far reaching impact. They will affect the enforcement efforts not only on state securities regulatory agencies, but also those of all state and federal enforcement agencies in the consumer protection area. Further, they may impact many criminal justice programs which incorporate restitution as one of the available criminal penalties.

If allowed to stand, the lower court decisions in the present case will have a direct impact upon most of the other members of NASAA. As will be seed below, four other states have statutory authority similar to that granted by Section 7325(b) of the Delaware Securities Act to grant administrative restitution or rescission. Twenty-six other members have statutory provisions specifically allowing the securities agency to seek restitution or rescission in a court action for injunction. Three additional jurisdictions grant their securities agency

specific authority to seek disgorgement, a remedy having a similar effect to restitution or rescission.

Many other consumer protection and public welfare statutes contain similar authority to seek either agency or court-ordered rescission, restitution, or disgorgement.[3] The decision below could also be used as a basis for restricting the availability of these remedies under these statutes as well.

Nor is the potential impact of the Third Circuit's decision limited to the state level. Many federal agencies such as the Securities and Exchange Commission[4] and self-regulatory agencies such as the National Association of

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[3] See e.g., Wis. Stat. Ann. § 426.100; Uniform Consumer Credit Code § 6.113, 2 Consumer Credit Guide ¶ 5363 (1969). The Uniform Consumer Credit Code has been adopted in eight states and territories. Colorado, Guam, Indiana, Oklahoma, South Carolina, Utah, Wisconsin and Wyoming.

[4] See e.g., SEC v. Washington County Utility Dist., 676 F.2d 218 (6th Cir. 1982).

Securities Dealers[5] have traditionally used rescission, restitution, and disgorgement to deny violators of the fruits of their violation.[6]

The Third Circuit's decision could also have a major impact in the criminal law area as well.[7] Increasingly, the states are allowing their courts to order restitution as part of the sentence which may be imposed or

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[5] See e.g., Hateley v. SEC, 1993 U.S.App. LEXIS 26840 (9th Cir. Oct. 18, 1993).

[6] While admittedly the issue here would not be preemption by the FAA, the same rationale could be used to argue that Congress intended the FAA to be superior to the recovery provisions of the regulatory statutes.

[7] Both the state and federal securities acts make it a felony to violate the provisions of the act. See e.g., Section 24 of the Securities Act of 1933, 15 U.S.C. § 77x (1990); Section 7322 of the Delaware Act, 6 Del. C. § 7322; Section 409 of the Uniform Securities Act, Uniform Securities Act § 409, 1 Blue Sky L. Rep. (CCH) ¶ 5549 (1957). Section 409(b) of the Uniform Act specifically authorizes the securities agency to refer criminal cases to the local prosecuting attorney or Attorney General. This provision was not included in the Delaware Act because the Securities Commissioner is part of the Department of Justice.

as a condition of parol.[8] If the opinions below are allowed to stand, the State could not seek, nor could the court grant, such relief where the defendant had entered into an arbitration agreement with his victims.

Clearly, Congress did not intend to impact these areas of civil and criminal enforcement when it passed the FAA in the mid-1920's. The sole purpose of the passage of the FAA was to reverse the centuries old prejudice of the courts against arbitration. ***Southland Corp. v. Keating***, 465 U.S. 1, 10, (1984); ***Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.***, 460 U.S. 1, 24 (1963). This rather obscure 65-year old statute should not be re-interpreted in a way never intended by Congress. It is not super statute which trumps all other federal or state statutes which might impinge

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[8] See e.g., People v. Richards, 17 Cal. 3d 614, 13 Cal. Rptr. 537, 552 P.2d 97 (1976). This concept has been applied in the securities area. People v. Baumgart, 218 Cal. App.3d 1207, 267 Cal. Rptr. 534 (1990); State v. Stephan, 35 Wn. App. 889, 671 P.2d 780 (1983).

to a limited degree upon its full application. Certainly, there was no Congressional intent, when adopting the FAA, to prohibit state administrative agencies from seeking the full range of possible equitable relief in their civil enforcement cases under consumer protection and public welfare statutes properly adopted under the state's police power. Nor did Congress intend to restrict the federal administrative agencies[9] or the ability of the

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[9] The same issue exists at the federal level in a slightly different context. Section 20 of the Securities Act of 1933, 15 U.S.C. §77t (1990) and Section 21(d)(1) of the Exchange Act of 1934, 15 U.S.C. §78u (1990), allow the SEC to seek civil injunctions for violation of these federal acts. These Sections have uniformly been held to allow the SEC to seek general equitable relief in the form of disgorgement or restitution. See e.g., SEC v. Blavin, 760 F.2d 706 (6th Cir. 1985); SEC v. Shapiro, 494 F.2d 1301 (2d Cir. 1974); SEC v. Penn Cent. Co., 425 F. Supp. 593 (E.D.Pa. 1976). The issue at the federal level is not preemption since both the securities acts and the FAA are acts of Congress, but rather which should be given superior effect. It will no doubt come as a surprise to the SEC that it has lost the right to seek disgorgement or restitution in any enforcement case where the target of the action has an arbitration clause with his victims. Yet, this is the logical conclusion of the decisions below.

states to fashion appropriate relief in criminal cases.

A. IMPACT ON DELAWARE.

The two major fault with Third Circuit's decision are: (1) that the court failed to recognize the nature of the action by the Delaware Securities Commissioner against Olde; and, (2) that they failed to understand the purpose for giving the Administrator the right of restitution or rescission under Section 7325(b). The action against Olde is not a reparations action similar to that authorized by Congress under the Commodity Futures Trading Act.[10] The Commissioner, in the present case, is not being substituted for a court or an arbitrator as the hearing body in a private adversarial proceeding leading to

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[10] Congress specifically set up such an administrative private recovery system in Section 18 of the Act, 7 U.S.C. § 18 (1990). This system allows the Commission to hear investor complaints and to award reparations to injured investors upon establishment of a violation of the Commodity Act.

potential recovery by a private party.[11] Instead the action against Olde is an administrative enforcement action under Section 7316.

The Commissioner, through his staff, is seeking, on behalf of the State, to enforce the Securities Act. In doing so, he is acting in the same way that a prosecuting attorney would seek to enforce the Act through a criminal prosecution. In both cases, the State, not the Engelhardts, is the real party in interest. The Engelhardts are merely the victims and the complaining witnesses. An order granting restitution or rescission under Section 7325(b) is merely one of the alterna-

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[11] The trial court apparently thought such was the case when it said:

> [T]he Court concludes that the [Federal Arbitration Act] serves to withdraw the power of the states not only to require a judicial forum for the resolution of claims, but to require an administrative forum as well. Slip Op. at 7.

This would be a proper conclusion to reach as to a state administrative private reparations similar to that run by the CFTC. Southland Corp. v. Keating, 465 U.S. 1 (1984).

tive sanctions which may be assessed for violation of Section 7316(a)(1)-(13).

Judge Nygaard recognized this distinction when he stated in his dissent below:

> Thus, the Delaware statutory scheme makes clear that the Commissioner is not a surrogate for the plaintiff's attorney, but is a public official who administers the state's blue sky laws "in the public interest" and is endowed with broad enforcement and rule-making powers. See Blinder, Robinson & Co. v. Bruton, 552 A.2d 466, 475 (Del. 1989) ("The Commissioner has the discretion to impose any penalty deemed necessary to protect the public interest and further the Act's prophylactic purpose.") Although the Engelhardt's and the Commissioner's suits arise from the same transaction, their respective right or power to sue arises from two separate and distinct statutory provisions.

1 F.3d at 217 (Nygaard, J., dissenting).

This Court has held that such orders of restitution or rescission serve the public policy function of making sure that a violator does not profit from his violation. ***Porter v. Warner Holding Co.***, 328 U.S. 395 (1946). In this way, it serves much the same function as the equitable remedy of disgorgement. See e.g., ***SEC v. Blavin***, 760 F.2d 706 (6th Cir.

1985); ***SEC v. Shapiro***, 494 F.2d 1301 (2d Cir. 1974); ***SEC v. Penn Cent. Co.***, 425 F. Supp. 593 (E.D.Pa. 1976).

This Court has also recognized the public nature of restitution orders in criminal cases in ***Kelly v. Robinson***, 479 U.S. 36 (1986). In deciding that an obligation arising as a result of a state criminal restitution order could not be discharged in bankruptcy, the Court said:

> The criminal justice system is not operated primarily for the benefit of victims, but for the benefit of society as a whole. Thus, it is concerned not only with punishing the offender, but also with rehabilitating him. Although restitution does resemble a judgment "for the benefit of" the victim, the context in which it is imposed undermines that conclusion. The victim has no control over the amount of restitution awarded or over the decision to award restitution. Moreover, the decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant.

Id. at 52. See also ***SEC v. Bilzerian***, 814 F.Supp. 116 (D.D.C. 1993).

These same goals are present in the grant of authority under Section 7325(b) for the Delaware Commissioner to order restitution or rescission. In both cases, the purpose for allowing restitution or rescission is the public policy interest of the State. In both instances, the victim is merely an incidental beneficiary of State policy and has no control over the process by which the restitution or rescission is granted. Clearly, it was not in the public interest to enjoin the Securities Commissioner from carrying out his duty to enforce the Delaware Securities Act and the public policy expressed therein.

B. IMPACT ON OTHER STATE SECURITIES AGENCIES.

Some thirty-three other state securities agencies have specific provisions in their securities acts allowing either administrative or court ordered restitution, rescission, or disgorgement. Four of these states, Arizona, the District of Columbia, Indiana, and Vir-

ginia[12] have statutes similar to Section 7325(b) of the Delaware Securities Act, allowing administrative restitution or rescission. Twenty-six other states have statutory provisions specifically allowing the securities agency to seek restitution or rescission in a court action for injunction.[13] Three further jurisdictions, Arkansas, Michigan, and Tennessee grant their securities agency specific authority to seek disgorgement.[14]

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[12] Ariz. Rev. Stat. §44-2032(1) and Reg. of Ariz. Corp. Comm'n Rule 14-4-308; Dist. Col. Code §2-2614; Ind. Code §23-2-1-17.1(a); and Code of Va. §13.1-521(c).

[13] These states are: Alabama, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Maine, Massachusetts, Mississippi, New Mexico, New York, North Carolina, Oklahoma, Oregon Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, Washington, and Wisconsin.

[14] See Ark. Code §23-42-209(b) (1987); Mich. Compl. Laws §451.808(a) (1979); Tenn. Code Ann. §348-2-119 (b).

Most of the remaining states have adopted Section 408 of the Uniform Securities Act.[15] This section allows the agency to seek an injunction and ancillary relief. Both this court and the state courts have held that such ancillary relief includes rescission, restitution and disgorgement.[16] For example, this Court in ***Porter v. Warner Holding Co.***, 328 U.S. 395, 402 (1946), said:

> [U]nder §205(a) [of the Rent Control Act which was worded similarly to Section 408 of the Uniform Securities Act], [the equity courts have the power] to issue whatever "other order" may be necessary to vindicate the public interest, [and] to compel compliance with the Act...
> Restitution, which lies within that equitable jurisdiction, is consistent with and differs greatly from the damages and penalties which may be awarded under §205(e). [Citation omitted.] When the Administrator

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[15] 1 Blue Sky L. Rep (CCH) ¶5548 (1957). This Act has been adopted in 41 state or territorial jurisdictions. See 1 Blue Sky L. Rep. (CCH) ¶5500 (1992).

[16] See e.g, Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288 (1960); Porter v. Warner Holding Co., 328 U.S. 395 (1946); State ex rel. Day v. Southwest Mineral Energy, Inc., 617 P.2d 1334 (Okla. 1980). See also 12A J. Long, Blue Sky Law §9.05[6] (1992).

> seeks restitution under Section 205(a), he does not request the court to award statutory damages to the purchaser or tenant or to pay to such person part of the penalties which go to the United States Treasury in a suit by the Administrator under Section 205(e). Rather he asks the court to act in the public interest by restoring the status quo and order in the return of that which rightfully belongs to the purchaser or tenant. Such action is within the recognized power and within the highest tradition of a court of equity.

The decisions below, if not reversed, may set a precedent which would prevent these state agencies from exercising their statutory right to order or seek rescission, restitution or disgorgement.

C. IMPACT ON OTHER STATE AGENCIES.

The effect of the Third Circuit's decision is not limited to the area of the state securities administrators. Many state consumer protection and public welfare contain similar provisions. For example, the consumer finance statute in Florida,[17] the Franchise

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[17] FSA §516.23.

Disclosure Act in Illinois[18], and the Insurance Codes of Alabama and Arizona,[19] all allow the administrator or commissioner to grant administrative restitution under certain conditions. The California Government[20] and Insurance Code[21] as well as the Florida Retail Installment Sales Act[22] allow administrative agencies to seek court ordered restitution. A number of Uniform and Model state acts also have similar provisions. For example, the Model State Commodity Code adopted by eighteen states[23] allows the administrator to seek dis-

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[18] Ill. Comp. Stat. Ann., Ch. 815, §705/22.

[19] Ala. Code 1975, §27-5A-11; A.R.S. §20-486.10.

[20] West's Ann. Cal. Gov. Code, §13975.1

[21] West's Cal. Ann. Ins. Code, §789.

[22] F.S.A. 520.994.

[23] Arizona, California, Colorado, Georgia, Idaho, Indiana, Iowa, Maine, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oregon, Utah, and Washington. NASAA Rep. (CCH) ¶264 (1992).

gorgement[24]. The Uniform Consumer Credit Code, adopted in eight[25] states, also provides for restitution in a number of situations. The ability of the state agencies to continue to act under these provisions will be greatly impaired if the opinions below are allowed to stand.

Further, it is becoming increasingly common for state attorney generals, either individually or collectively, to bring Parens Patriae suits on behalf of consumers or residents of the state.[26] Again, the Third Circuit's decision would bring into question whether the attorney generals can bring such suits on behalf of those consumers or resi-

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[24] Model State Commodity Code, §2.02 (b)(3), NASAA Rep. (CCH) ¶4422 (1992).

[25] These states and territories are: Colorado, Guam, Indiana, Oklahoma, South Carolina, Utah, Wisconsin, and Wyoming.

[26] See e.g, Heller v. Doe, ___U.S. ___, 113 S.Ct. 2637 (1993); Foucha v. Louisana, ___U.S.___, 112 S. Ct. 1780 (1992)(mentally handicapped) and Kansas-Missouri v. Utilicorp United Inc., 497 U.S.199 (1990); California v. American Stores Co., 492 U.S. 1301 (1989)(anti-trust).

dents who had signed arbitration clauses with the defendants.[27]

D. IMPACT ON FEDERAL AGENCIES.

Section 20 of the Securities Act of 1933, 15 U.S.C. § 77t (1990) and Section 21(d)(1) of the Exchange Act of 1934, 15 U.S.C. § 78u (1990), allow the SEC to seek civil injunctions for violation of these federal acts. These Sections have uniformly been held to allow the SEC to seek general equitable relief in the form of disgorgement or restitution. ***SEC v. Blavin***, 760 F.2d 706 (6th Cir. 1985); ***SEC v. Shapiro***, 494 F.2d 1301 (2d Cir. 1974); ***SEC v. Penn Cent. Co.***, 425 F. Supp. 593 (E.D. Pa. 1976). Nor is the SEC alone in possessing

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[27] The same issue in raised in connection with class actions brought by members of the class whom have not signed arbitration agreements. May they represent members of the class who have?

this power. Both the FTC[28] and the CFTC[29] have similar authority.

The issue at the federal level will not be preemption since the various regulatory statutes and the FAA are acts of Congress. Yet, the reasoning of the Third Circuit could be used to argue that the proarbitration policy of the FAA was intended to be superior to the enforcement policy expressed in the individual regulatory statutes. As a result, it could be concluded that the FAA trumps the restitution authority of the various federal agencies.

E. IMPACT ON CRIMINAL JUSTICE.

The decisions below may also have a major impact in the criminal law area as well. The state and federal securities acts, as do most public welfare statutes, make it a felony to

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[28]Charnita, Inc. v. F.T.C., 479 F.2d 684 (3d Cir. 1973). See also 15 U.S.C. §1607 (1988).

[29]CFTC v. America Metals Exch. Corp., 991 F.2d 71 (3d Cir. 1993); CFTC v. Co Petro Mkts. Group, Inc., 680 F.2d 573 (9th Cir. 1982). 7 U.S.C. §13 (1988).

violate the provisions of the Act. See e.g., Section 7322 of the Delaware Act, 6 Del. C. §7322. As noted above, there is an increasing tendency for the states to allow orders of restitution as part of a criminal sentence, conviction or as a condition of probation.[30] This concept has been applied in the securities area. ***People v. Baumgart***, 218 Cal.App.3d 1207, 267 Cal. Rptr. 534 (1990); ***State v. Stephan***, 35 Wn. App. 889, 671 P.2d 780 (1983). If the opinion below remains unmodified, it could be argued that the State would be prohibited from seeking, or the court granting, rescissional or restitutional relief as part of a criminal conviction where the defendant had entered into an arbitration agreement with his victims.

F. THE FAA HAS NO APPLICATION.

As Judge Nygaard, in his dissenting opinion noted, the FAA should have no appli-

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[30] See Kelly v. Robinson, 479 U.S.36 (1986). See also Ark. C.A. §§8-4-103, 8-6-204, and 8-7-204 (pollution violations).

cation to the present case. 1 F.3d at 217. This Court has long recognized that the FAA only applies where both parties have agreed to arbitrate. ***Atkinson v. Sinclair Refining Co.***, 370 U.S. 238 (1962); ***United Steelworkers of America v. Warrior & Gulf Nav. Co.***, 363 U.S. 574 (1960). It is clear in the present case that the Commissioner has not so agreed. 1 F.3d at 218 (Nygaard, J., dissenting). As pointed out above, the trial court and the Third Circuit failed to separate the interests of the State in enforcing its Securities Act from the Engelhardt's interest in securing recovery under that Act.[31] Those interests are separate and distinct. As Judge Nygaard concluded, the State should not be bound by the Engelhardt's agreement to arbitrate when it is seeking to enforce its own independent interests even though such enforcement may

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[31]Judge Nygaard, in his dissenting opinion, properly makes this distinction and it is the basis for his dissent. 1 F.3d at 217-218.

incidentally benefit the Engelhardts.[32] The State, having not agreed to arbitrate, is not subject to the FAA.

In summary, it should be clear from the above discussion that the preemption issue involved in the present case is one of primary national importance. It involves the accommodation of two major public policies--that of the right of the individual to enter into an enforceable arbitration agreement and that of the State to prevent violation of its statutes properly enacted under the police power for the welfare and benefit of its citizens. This Court should exercise its discretion under Rule 10.1(c) to hear and decide the case.

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[32] He said:

> The Commissioner cannot be bound by an agreement to which he neither agreed nor was a party. One cannot bargain away that which one does not possess.

Id. at 218.

II. THE THIRD CIRCUIT'S DECISION THAT THE COMMISSIONER'S POWER TO ORDER RESTITUTION OR RESCISSION UNDER SECTION 7325(b) WAS PREEMPTED BY THE FEDERAL ARBITRATION ACT IS CONTRARY TO THE DECISIONS OF THIS COURT.

NASAA and the NCL submit that the Third Circuit's decision that the Federal Arbitration Act preempted the power of the Delaware Commissioner to seek rescission under Section 7325(b) of the Delaware Securities Act is contrary to the prior holdings of this Court. As a result, the Court should grant certiorari to review the matter under Rule 10.1(c).

The Court recently stated in ***Schneiderwind v. ANR Pipeline Co.***, 485 U.S. 293, 299 (1988):

> A pre-emption question requires an examination of congressional intent. [Citation omitted.] Of course, Congress explicitly may define the extent to which its enactments preempt state law. See e.g, Shaw v. Delta Air Lines Inc., 463 U.S.85, 95-96 (1983). In absence of explicit statutory language, however, Congress implicitly may indicate an intent to occupy a given field to the exclusion of state law. Such purpose properly may be inferred where the pervasiveness of the federal regulation precludes supplementation by the States, where the federal interest in the field is sufficiently dominant, or where "the object sought to be obtained by the

federal law and the character of obligations imposed by it...reveal the same purpose." Rice v. Santa Fe Elevator Corp., 331 U.S. 218,230 (1947). Finally, even where Congress has not entirely displaced state regulation in a particular field, state law is pre-empted when it actually conflicts with federal law. Such a conflict will be found "'when it is impossible to comply with both state and federal law, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963), or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, Hines v. Davidowitz, 312 U.S. 52, 67 (1941).'" California Coastal Comm'n v. Granite Rock Co., 107 S.Ct. 1419, 1425 (1987), quoting Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984). (Citations modified).[33]

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[33] As Judge Widner pointed out in his dissent in **Saturn Distribution Corp. v. Williams**, 905 F.2d 719, 728 (4th Cir. 1989) (Widner, J. dissenting), these categories of preemption are not of equal weight but rather represent "a sliding scale in which a finding of preemption becomes more difficult as the tension between state and federal enactments becomes more obscure." He goes on to point out that the category of preemption resulting from the frustration of federal policy rests at the bottom of this sliding scale because this theory is more an exercise of policy choices by a court than strict statutory construction. Moreover, this independent judgment has to be made without aid of congressional guidance because of both express or implied congressional silence on the matter, **Abbot v. American Cyanamid Co.**, 844 F.2d 1108, 1113 (4th Cir.), **cert. denied**, 488

The following year, the Court, in ***Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University***, 489 U.S. 468, 477 (1989), specifically addressed the preemption issue in the context of the FAA. It said:

> The FAA contains no express preemption provision, nor does it reflect a congressional intent to occupy the entire field of arbitration.

Thus, it is clear that the first two grounds for preemption do not exist under the FAA in the present case. Section 7325(b) of the Delaware Securities Act does not in any way prohibit arbitration clauses. It merely provides that the commissioner may order restitution as one of the penalties which may be assessed against a broker-dealer for violation of the Delaware Securities Act. Further, Olde could comply with both the federal act and the state statute.

U.S. 908 (1988) and in the face of a presumption against preemption in the case of such silence. **Id.** at 1112.

Therefore, the Third Circuit's conclusion on preemption has to be based upon a holding that Section 7325(b) stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Yet, as Professor Tribe states, summarizing the holding of this Court:

> [S]tate laws that merely push against the grain of "general expressions of national policy" in federal statutes will not, for that reason alone, be deemed to be preempted.

L. Tribe, American Constitutional Law §6-26 at 488 (1988).

The decision below is clearly in conflict with the holding of this Court. This Court said in ***Louisiana Public Service Comm'n v. FCC***, 476 U.S. 355,370 (1986), federal and state law "should be read so as not to create a conflict" if at all possible. Such a position is based upon two primary premises: (1) that the diffusion of power will further democracy and (2) that a finding of no preemption may be overridden by Congress whereas a finding of preemption can not. ***Agency Rent-***

A-Car, Inc. v. Connolly, 686 F.2d 1029 (1st Cir. 1982). Further, the presumption in favor of validity and against preemption is strongest in a case where the state is seeking to exercise an acknowledgedly valid police power. As this Court said in ***California v. ARC America Corp.***, 490 U.S. 93, 101 (1989):

> [W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

quoting ***Rice v. Santa Fe Elevator Corp.***, 331 U.S. 218, 230 (1947).

The present case involves a well recognized exercise of that police power. This Court has long recognized that the state has the right to regulate broker-dealers under the police power. ***Travelers Health Assoc. v. Virginia***, 339 U.S. 643 (1950) and ***Merrick v. N.W. Halsey & Co.***, 242 U.S. 568 (1917). As developed above, there is a strong State interest in giving the Commissioner the authority to issue orders of restitution or

rescission. The victims, in this case, the Engelhardts, are merely the incidental beneficiaries of the vindication of that State interest.

This Court, in ***Gilmer v. Interstate/ Johnson Lane Corp.***, ___U.S.___, 111 S. Ct. 1647 (1991), held that private claims under the Age Discrimination and Employment Act ("ADEA") could be made subject to a compulsory arbitration clause. As in the case of the securities acts, ADEA provides for enforcement through both private suit and public enforcement actions by the Equal Employment Opportunity Commission ("EEOC"). The Court specifically addressed the issue of whether a private arbitration clause would prevent the EEOC, or the courts at its request, from granting relief. The Court said:

> We also are unpersuaded by the argument that arbitration will undermine the role of the EEOC in enforcing the ADEA. An individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial

> action. ___U.S. at ___, 111 S. Ct. at 1653.

This is exactly what the Engelhardts have done in the present case.

The Court then went on to address the ability of the EEOC to act on that complaint. It said:

> Finally, it should be remembered that arbitration agreements will not preclude the EEOC from bringing actions seeking class-wide and equitable relief.

Id. at ___, 111 S. Ct. at 1655. [Emphasis added.]

Thus, this Court has made clear that private arbitration clauses are not to be considered to impinge upon the right of an administrative agency to enforce the statutes that they are charged with administering. These agencies are free to exercise their statutory powers to grant administrative relief and to seek all authorized judicial relief, including equitable relief such as rescission, restitution or disgorgement as outlined by this Court in ***Porter v. Warner***

Holding Co., 328 U.S. 395, 402 (1946), quoted above. As a result, the conclusion of pre-emption by the Third Circuit simply does not square with this Court's decision *Rice*, *ARC America*, *Gilmore*, and the other cases cited above.

III. THE RENDERING OF THREE SEPARATE OPINIONS BY THE THIRD CIRCUIT LEAVES AN UNSATISFACTORY SITUATION AS TO THE STATE OF THE LAW IN THIS CASE AND THE COURT SHOULD EXERCISE ITS SUPERVISORY JURISDICTION TO SETTLE THE UNCERTAINTY.

The Third Circuit opinion in the present case is the worst possible decision in order to resolve, clearly and finally, the pre-emption issue. Instead of issuing a single opinion, three separate opinions were entered, each taking a different position. One judge, Judge Greenberg, voted to affirm the trial court on a theory of preemption. Judge Nygaard specifically dissents on this issue, holding as NASAA and the NCL suggest that there should be no preemption. Finally, Judge Rosenn concurs in the affirmance of the trial court, but on a contract theory. Thus, there

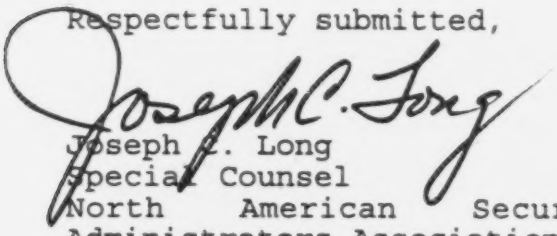
is no majority decision as to the preemption issue, merely an affirmance of trial court decision. This leaves a clearly unsatisfactory state of the law. The Delaware Commissioner is enjoined from enforcing his statute, but he does not know whether such conclusion is based upon preemption or contract or both. Similarly, other states and their enforcement agencies are at a loss as to how the decision should be applied to their acts. Since the Greenberg opinion appears as the opinion of the court, it will no doubt be cited by counsel and other courts as the majority opinion, when in fact it is not.

The State of Delaware, as well as the other states whose acts may be affected, are entitled to a resolution of this issue and that resolution should come from this Court. Therefore, the Court should exercise its supervisory authority over the lower federal courts to grant certiorari as provided in Rule 10.1(a).

CONCLUSION

For the above stated reasons, NASAA urges the Court to grant certiorari in the present case.

Respectfully submitted,



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